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91-1350

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1991

ROMAN AND IMELDA SPAETH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether a United States District Court may grant summary judgment in favor of the IRS in a 26 U.S.C. Section 7403 foreclosure action, when the owner of the real property was neither notified of the action or joined as a party.

Whether a United States District Court may refuse to consider a parties request for summary judgment made in their responsive pleadings -- under Rule 56 of the Fed. R. Civ.P., -- because they did not initiate the motion hearing.

TABLE OF CONTENTS

	Page
Opinion Below.....	1
Jurisdiction.....	2
Statutory Provisions Involved.....	2
Statement of the Case.....	3
Reasons for Granting the Petition....	6
Conclusion.....	13
Appendix A.....	1a
Appendix B.....	4a
Appendix C.....	5a

TABLE OF AUTHORITIES

Cases:	Page
In re Carvan Refrigerated Cargo, Inc., 864 F.2d 38 (5th Cir. 1989).....	12
DeBois v. Environmental Protection Agency, 646 F.Supp. 741 (W.D. Mo. 1986) rev. on other grounds, 820 F.2d 943 (8th Cir. 1987).....	11
Golden State Transit Corp. v. City of Los Angeles, 563 F.Supp. 169 (D.C. Cal. 1983) affirmed 726 F.2d 1430 (9th Cir. 1984).....	12
Lindsey v. U.S. Bureau of Prisons, U.S. Dept. of Justice, 736 F.2d 1462 (11th Cir. 1984) vacated on other grounds 469 U.S. 1082 (1984)	12
Mason v. Melendez, 525 F.Supp. 270, (D.C. Wisc. 1981).....	12
National Exposition v. Crowley Martine Corp., 824 F.2d 131 (1st. Cir. 1987).....	12
Procter & Gamble Independent Union of Port Ivory, New York v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2nd Cir. 1962), *cert. den.* 374 U.S. 830.....	12
Pueblo of Santa Ana v. Mountain State Tel. & Tel Co., 734 F.2d 1402 (10th Cir. 1984).....	12
Roberts v. Fuguary-Varina Tobacco Bd. of Trade, Inc., 223 F.Supp. 212, (D.C.N.C. 1963) aff'd in part and remanded in part on other grounds per curiam, 332 F.2d 521 (4th Cir. 1964).....	12
United States v. Boyd, 246 F.2d 889 5th Cir. 1957), *cert. denied*- 355 U.S. 889.....	8
United States v. Carlow, 323 F.Supp. 1310 (D.C. Pa. 1971).....	7
United States v. Ragsdale, 206 F.Supp. 613 (D.C. Tenn. 1962).....	7
Weil Ceramics & Glass, Inc. v. Dash, 618 F.Supp. 700, (D.C.N.J.) rev'd in part, vacated in part on other grounds, 878 F.2d (3rd Cir. 1989).	12

Statutes:

26 U.S.C.A. Section 7401.....	*passim*
26 U.S.C.A. Section 7402.....	*passim*
26 U.S.C.A. Section 7403.....	*passim*
28 U.S.C.A. Section 1292.....	2
Rule 56, Fed. R. Civ. P.....	10,11,13

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Roman and Imelda Spaeth respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States of Appeals for the Eight Circuit, entered in the above-entitled proceeding on January 9, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported and is reprinted in (App. A, p. 1a). The prior opinion of the United States District Court (App. C. p. 5a.) for the District of Minnesota, also reprinted in the appendix, is reported as follows: [unpublished]
The United States Court of Appeals, January 9, 1992 denying rehearing and rejecting the suggestion of rehearing en banc (App. B, 4a) is unreported.

JURISDICTION

The opinion of the Court of Appeals was entered November 22, 1991.

Petitioners' petition for rehearing was denied on January 9, 1992. The court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1). Jurisdiction of the District Court was invoked under 26 U.S.C. Sections 7401, 7402 and 7403. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C.A. Section 1292(a)(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. Section 7403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case arose from a lawsuit brought under 26 U.S.C. Sections 7401, 7402 and 7403 to eject Roman and Imelda Spaeth from property they resided on which the State of Minnesota owned.

STATEMENT OF THE CASE

The I.R.S. filed a complaint on October 31, 1990 to eject Roman and Imelda Spaeth from a small house. The Spaeths answered on December 6, 1990, asserting the affirmative defenses, including "[t]he I.R.S. did not own the property or sufficient property interest to obtain the relief it seeks."

The I.R.S. did not join or notify the State of Minnesota of the action, although the State claimed it had absolute ownership of the property. Others having an interest in the property (according to the I.R.S.) were never notified by the I.R.S. of the action or joined. 26 U.S.C. Section 7403(b) required joinder of any persons having or claiming an interest in the property. Section 7403(c) allows the District Court the jurisdictional authority to proceed only after the parties which claim or have an interest in the property are notified and/or joined. *See* 26 U.S.C. Section 7403(c).

The Court proceeded with the I.R.S.'s motion for summary judgment. Counsel for the I.R.S. at the hearing, stated ". . . WE BELIEVE THAT THERE IS DEFINITELY SOME GENUINE ISSUES OF FACT REGARDING WHETHER OR NOT THE STATE OF MINNESOTA OWNS THE PROPERTY." (Pets' App. - appellate ct. - Exh 1, p 83 LL 4-6) The District Court considered the issue of the State's ownership "immaterial," granting summary judgment in favor of the I.R.S. (Pets' App. 5a)

Although the District Court in its Order states, "Summary judgment in favor of the defendants [Spaeths] is appropriate, the Court disregarded everything the Spaeths submitted (argument and evidence), on the basis that one who does not initiate a motion for summary judgment [respondent] is not entitled to summary judgment because they did not initiate the motion. (Pets' App. 6a) The District Court stated, "Defendants have attempted to move for summary judgment but have not filed a motion. Consequently the court does not consider their arguments for summary judgment. (Pets' App. 6a)

The District Court is not referring to the briefs that Spaeths filed. It refused to consider any of Spaeth's arguments for Summary Judgment because Spaeths were not the party that originated the Motion.

REASONS FOR GRANTING THE PETITION

Whenever a federal agency is given carte blanche treatment pertaining to its desires regarding real property and: A. either the jurisdiction of the District Court has not been invoked and/or B. indispensable parties have not been joined, grave constitutional concerns exist. Our entire economic system is based on property interest and the requirement in I.R.C. Section 7403 that any party having an interest in the subject property be notified or joined addresses substantive due process issues this Court should be concerned about.

The District Court's decision that respondents could not be afforded summary judgment and that their arguments and evidence need not be considered because they did not notice the motion is contrary to any court that has ever addressed it. The fact that the Eight Circuit Court of Appeals failed to address militates in favor of the Court addressing it.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE I.R.S. BECAUSE:

A. IT LACKED JURISDICTION AND/OR

B. FAILED TO REQUIRE JOINDER OR NOTICE OF AN INDISPENSABLE PARTY

The District Court could not have properly granted summary judgment under any standard. Before any Court can grant summary judgment it must have jurisdiction to do so. A foreclosure action under 26 U.S.C. Section 7403(a) can only apply to property that the taxpayer has any right, interest or title in; which interest may be applied to the liability. Whether the taxpayer has an interest in a particular property to which a federal tax lien can attach is determined by state law. *United States v. Carlow*, 323 F.Supp. 1310 (D.C.Pa. 1971). State law determines the nature of the property rights against which a tax lien is asserted and the rights of the I.R.S. to the proceeds of the foreclosure. *United States v. Ragsdale*, 206 F. Supp. 613 (D.C.Tenn. 1962).

Although Section 7403(a) speaks in terms of foreclosure of federal tax liens, it does not compel any Court to use that remedy: a) if the lien does not exist, b) if it has been lost, c) if the property is not that of the taxpayer, or d) if the federal tax lien is junior to undisputed prior liens which will exhaust full value of the property. In such cases a decree of foreclosure would be neither appropriate nor effective. This District Court had full capacity and a corresponding duty to assure that liens and interests are effectually respected in accordance with the court's determination of validity, rank and priority. *United States v. Boyd*, 246 F.2d 889 (5th Cir. 1957), *cert. denied* 355 U.S. 889. The District Court's statement to the effect that it was immaterial whether the State of Minnesota owned the property established that this duty was not addressed. (Pets' App.8a) Up to the time of oral argument the I.R.S. never refuted the contention that the State of Minnesota owned the property. The I.R.S. in fact had no interest, right or title

in the property whatsoever at the time the District Court granted summary judgment in its favor.

The State of Minnesota and others were indispensable parties whose joinder in this action was required. Section 7403(b)' of the I.R.C. mandates that "[a]ll persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The State of Minnesota had title to the property per statute, it held itself out as having title and the I.R.S. intentionally failed to join it.

Minnesota Real Property law established that the State of Minnesota had absolute title to the property at the time the underlying action was begun by the I.R.S. and at the time summary judgment was granted in the I.R.S.'s sole favor. The I.R.S. failure to join the State of Minnesota, an indispensable under 26 U.S.C. Section 7403; deprived the District Court of a proper jurisdictional basis on which to adjudicate the matter.

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DECREEING THAT A RESPONDENT COULD NOT OBTAIN SUMMARY JUDGMENT BECAUSE THEY HAD NOT BROUGHT THE MOTION AND IN USING THAT RATIONALE TO DISREGARD SPAETHS' ARGUMENTS FOR SUMMARY JUDGMENT

The I.R.S. brought a motion under Rule 56 of the Fed. R. Civ. P., requesting summary judgment against the Spaeths.

The District Court stated "[t]his motion is before the Court upon the plaintiff's [I.R.S.'s] motion for summary judgment." The District Court refused to consider Spaeths' arguments or evidence stating the "[d]efendants have attempted to move for summary judgment but have not filed a motion. Consequently the Court does not consider their arguments for summary judgment." (Pet. App.6a, footnote 1)

The Spaeths filed two memorandums, and requested summary judgment in their favor. They did not file a "motion" for summary judgment because they were not the moving party. Rule 56 allows summary judgment to be granted to either party. Rule 56 does not allow the District Court to ignore a parties evidence and arguments for summary judgement because they are not the moving party which filed the "motion."

The District Court's holding that a responding party may not obtain summary judgment is in clear conflict with any Federal Court which has addressed it.

When the I.R.S. brought its Rule 56 motion, the Spaeths requested summary judgment against the I.R.S. in their reply memorandums. The I.R.S. argued that because Spaeths were requesting summary judgment against it, that certain alleged prerequisite requirements existed. The I.R.S. claimed that in order for the Spaeths to obtain summary judgment, they: 1. must be the moving party, 2. must file a separate motion for summary judgment, and 3. must comply with the time limitations a moving party has to follow.

These illusionary requirements do not exist under Rule 56; yet Spaeths pleadings and evidence were completely ignored on this basis. (Pets' App. 6 a, footnote 1)

The Eight Circuit has already rejected such arguments. *See DuBois v. Environmental Protection Agency*, 646 F.Supp. 741 (W.D. Mo. 1986) reversed on other grounds, 820 F.2d 943 (8th Cir. 1987).

Every Federal Circuit Court that has considered this argument has rejected it. The District Court's Opinion in the present case is the sole exception. (Pet. App. 5a) The Spaeths cited ample authority to the Eighth Circuit District and Appellate Courts, that they were entitled to summary judgment (at least to have their arguments heard and evidence considered) even though they did not initiate the motion.

National Exposition v. Crowley Martine Corp., 824 F.2d 131, 133 (1st Cir. 1987); *Procter & Gamble Independent Union of Port Ivory, New York v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2nd Cir. 1962), *cert.. den.* 374 U.S. 830; *Weil Ceramics & Glass, Inc. v. Dash*, 618 F. Supp. 700, 716 (D.C.N.J. 1985) rev'd in part, vacated in part on other grounds, 878 F.2d (3rd Cir. 1989); *Roberts v. Fuguary-Varina Tobacco Bd. of Trade, Inc.*, 223 F.Supp. 212 (D.C.N.C. 1963) aff'd in part and remanded in part on other grounds per curiam, 332 F.2d 521 (4th Cir. 1964); *In re Caravan-Refrigerated Cargo, Inc.*, 864 F.2d 388, 393 (5th Cir. 1989); *Mason v. Melendez*, 525 F. Supp. 270, 287 (D.C. Wisc. 1981); *Golden State Transit Corp. v. City of Los Angeles*, 563 F.Supp. 169 (D.C. Cal. 1983) affirmed 726 F.2d 1430 (9th Cir. 1984); *cert.. den.* 471 U.S. 1003; *Pueblo of Santa Ana v. Mountain State Tel. & Tel Co.*, 734 F.2d 1402, 1408 (10th Cir. 1984) reversed on other ground 472 U.S. 237 (1985); *Lindsey v. U.S. Bureau of Prisons, U.S. Dep't of Justice*, 736 F.2d 1462, 1463 (11th Cir. 1984) vacated on other grounds 469 U.S. 1082 (1984).

The I.R.S., the District Court and the Appellate Court have not cited one case for its contention that a respondent cannot be entitled to summary judgment because it was not the party that initiated "filed" the motion and obtained a hearing date.

CONCLUSION

The District Court's carte blanch treatment of the I.R.S. must not be allowed if there is to be any meaningful separation between the judicial system and administrative agencies. The District Court's treatment of Rule 56 is in conflict with every Court (District and Appellate) that has ever addressed the issue. The District Court's complete failure to require the joinder or notice of indispensable parties under 26 U.S.C. Section 7403 also conflicts with every Court that has addressed the issue. The Petition for Certiorari should be granted.

Dated: February 17, 1992.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1721MN

United States of America,

Appellant,

v.

Roman Spaeth and Imelda Spaeth,

Appellee.

[UNPUBLISHED]

Appeal from the United States District Court for the District of Minnesota.

Submitted: October 23, 1991

Decided: November 22, 1991

Before BEAM, HEANEY, and LOKEN, Circuit Judges

PER CURIAM.

Roman and Imelda Spaeth appeal from the district court's[1] order granting summary judgment to the United States in this ejectment action.
We agree.

The United States, after assessing unpaid federal income taxes against the Spaeths, serving notice of seizure, purchasing the property at a sealed-bid sale, and waiting for the redemption period to expire, brought this action to eject the Spaeths' from the property. On the governments's motion for summary judgment, the district court rejected, as immaterial, the Spaeth's contention that the government could not eject them because the State of Minnesota had taken action to enforce its own lien for unpaid state taxes.

The district court agreed with the government that the Spaeths were collaterally estopped from challenging the original levy. *See Xemas, Inc. v.United States*, 689 F.Supp. 917 (D. Minn. 1988) (government's levy and sale not wrongful against property titled to Xemas, Inc., for tax assessments due from the Spaeths where Spaeths fraudulently

conveyed property to Xemas, Inc. to avoid paying taxes), *aff'd*, 889 F.2d 1091 (8th Cir. 1989) (Table, No. 88-5284) (per curiam), *cert. denied*, 110 S. Ct. 1472 (1990).

We have carefully reviewed the record, and we conclude the district court's grant of summary judgment was correct. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1721MN

United States of America,

Appellee,

vs.

Roman Spaeth and Imelda Spaeth,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

January 9, 1992

Order Entered at the Direction of the Court:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT

EIGHTH CIRCUIT

No. 3-90-638

United States of America,

Plaintiff,

v.

Roman Spaeth and Imelda Spaeth,

Defendant.

ORDER

Filed March 18, 1991.

Before MAGNUSON
Circuit Judge

Jay P. Golder, Esq., Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 7238, Washington, D.C., 20044, for plaintiff.

Roman Spaeth and Imelda Spaeth, *pro se*, Box 72, Richmond, MN 56368.

This matter is before the court upon plaintiff's motion for summary judgment.[1] For the reasons set forth below, plaintiff's motion is granted.

FACTS

This is an action for ejectment brought pursuant to 26 U.S.C. Sections 7401, 7402 and 7403. Defendants currently reside on real property located in Stearns County, Minnesota. On July 14, 1980, a delegate of the Secretary of the Treasury timely assessed federal income taxes against the defendants in the amount of $3,380.39, plus interest and statutory additions accruing after the respective dates of assessment.

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[1]Defendants have attempted to move for summary judgment but have not filed a motion. Consequently the court does not consider their arguments for summary judgment.

On August 31, 1981, a notice of federal tax lien was filed with the Stearns County Recorder against the defendants for the 1977 joint income tax liability.

On July 14, 1980, a delegate of the secretary of the treasury timely assessed federal income taxes against BBCA, Inc., now known as God's Helping Hands, Inc., a Minnesota corporation, as nominee of the defendants, in the amount of $3,380.39, plus interest and statutory additions accruing after the respective dates of assessments.

On September 18, 1984, a Notice of Federal Tax Lien was filed with the Stearns County Recorder against BBCA, Inc. as nominee of the defendants.

The Internal Revenue Service issued a notice of seizure for the real property on July 7, 1986 and a sealed-bid sale was held at which the United States purchased the real property on July 20, 1987. The 180 -day redemption period has expired without a tender of payment by the defendants.

DISCUSSION

Under Fed. R. Civ. P. 56, summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Here, defendants have not controverted any material fact established by the government. Defendants instead seek to relitigate findings from which they are collaterally estopped. *See In re Xemas, Inc.*, 698 F. Supp. 917 (D. Minn. 1988). Additionally, defendant's contentions regarding Minnesota state taxes are immaterial. Summary judgment in favor of the defendants is appropriate.

Accordingly, IT IS ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. Defendants are ejected from the premises having the following legal description:

> The South 72 feet of Lots 4, 5, and 6, Block Three, Ahmann's Addition to the Village of Richmond, Stearns County, Minnesota.

3. The United States Marshal is authorized to take any action necessary to provide possession of the premises to the United States.